IN THE

Supreme Court of the United States

October Term, 1975
No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., et al.,

Appellants,

v.

HUGH L. CAREY, et al.,

Appellees.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF BOARD FOR LEGAL ASSISTANCE TO THE JEWISH POOR, INC. AND MARTIN GROSS

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE

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1. The Board for Legal Assistance to the Jewish Poor, Inc., and Martin Gross, who is a resident and voter in Williamsburgh, hereby apply for leave to submit the attached brief.

2. The Board for Legal Assistance to the Jewish Poor, Inc., hereinafter referred to as the Board, is a not-for-profit corporation established to study the problems of providing legal services to the Jewish poor throughout the City of New York. A major purpose of the Board is to "study and do research in areas which Jewish poor require social, recreational and community services.

3. The Board has no funding source and relies upon the volunteer services of its members. The Board serves as the advisor to Community Action for Legal Services-Brooklyn Branch, in all matters relating to Jewish poverty.

4. The Board feels that because it has rendered much-needed legal and social assistance to Williamsburgh residents and is intimately familiar with the community, they would be ideally suited to present an argument from the amicu's unique perspectives.

5. Pursuant to Rule 42 of the Revised Rules of this Court, consent to the filing of this brief was requested in writing of all parties on December 31, 1975. Consent was granted by all, with the exception of the Corporation Counsel who has not responded to our request.

6. The amici are concerned specifically with the problem of protecting the political and social rights of the minority Hasidic community, and, more generally, with the preservation of the principles of racial harmony,

equality, and stability in Williamsburgh. The amici and their counsel believe that their knowledge of the legal and social implications of racially-motivated reapportionment can assist this Court in its consideration of the important issues before it.

C O N C L U S I O N

For the foregoing reasons, the motion to file the attached brief amici curiae should be granted.

Respectfully submitted,

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BRIEF OF MARTIN GROSS AND BOARD FOR LEGAL ASSISTANCE TO THE JEWISH POOR, INC.

INTEREST OF THE AMICI CURIAE

Martin Gross resides and votes in Williamsburgh. He contends that, as one of the area's Hasidim, his right to participate in the processes of electoral government--as a voter or as a candidate for office--has been substantially compromised by a racial gerrymander which intentionally undercuts his group's political power.

The Board for Legal Assistance to the Jewish Poor and Martin Gross believe that the reapportionment legislation of 1974 impinges on the integrity and constitutional rights of all the residents of Williamsburgh. They believe that the judiciary must now act to prevent discrimination; and that the courts must come to the aid of all minority groups who are legislatively abused. The amici firmly

contend that the holding of the majority below presents grave dangers to the notion of racial and ethnic equality and must be reversed by this Court.

In the view of the amici, this Court will protect the constitutional rights and social integrity of all the residents of Williamsburgh by reversing the holding of the court below.

QUESTIONS PRESENTED[1]

1. Whether a gerrymander of electoral districts based on a quota requirement of 65% non-whites is a valid method to achieve equal electoral representation for non-whites.

2. Whether such a gerrymander is justifiable when, as a result, a unique white community is torn assunder by newly drawn election lines and is thereby rendered politically powerless.

1/ We note at the outset that we do not concede the validity of the assumption of the appellees and the majority below that the proposed reapportionment design of 1972 (Laws of New York (1972), ch. 11) was so deficient as to require "corrective action." Quite to the contrary, we firmly believe that the inclusion of a very substantial non-white majority in the appellants' district was more than sufficient to constitute compliance with the mandate of §5 of the Voting Rights Act, 42 U.S.C. §1973c. We furthermore fully concur in the appellants' argument--amply substantiated in their brief--that this Court's decision in City of Richmond
(continued)

ARGUMENT

I

A REAPPORTIONMENT TO CREATE A 65% NON-WHITE ELECTORAL DISTRICT CONFLICTS WITH THE CONSTITUTIONAL PRINCIPLE OF RACIAL EQUALITY.

"No army is stronger than an idea whose time has come." V. Hugo, Histoire d'un Crime, conclusion (1852). But noble ideas, like victorious defending armies, sometimes sweep by with such unchecked fury that they leave in their wake more

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v. United States, 422 U.S. 358 (1975), vitiates the very core of the position taken by the appellees and the court below; in the absence of any evidence that there were no "objectively verifiable legitimate reasons" attaching to the 1972 apportionment, there is no basis for its invalidation, even if it was discriminatory.

Separate and apart, however, from the issue of the need for "corrective action," the questions we raise in this presentation relate to the appropriateness and constitutional validity of the effectuated "corrective action," particularly in view of the unquestioned dire consequences this action entails for the appellants and their community.

carnage and misery than they sought to avert.

Although the notion of full racial equality was painfully slow to take root in the United States, there can be no question that "equal opportunity" and "affirmative action" are the shibboleths of the day--and rightfully so. To be sure, blacks and other minorities have not yet achieved parity on all fronts. And, indeed, this has been the concern of some benevolent powers who, over the past decade, have continued to put forth well-intentioned programs and solutions which all too often do a disservice to both white and non-white America. It is precisely this type of benign but misdirected thinking which underlay the eleventh-hour slapdash activities of the Justice Department and the New York State legislature and culminated in the unfortu-

nate reapportionment plan of 1974, Laws of New York (1974), chs. 588, 589, 590, 591 and 599.

The Justice Department rejected both the existing apportionment which described a 61.5% non-white Williamsburgh district, and a proposed district with a 63.4% non-white population, because such majorities were not considered sufficiently "safe." To be brutally blunt, the Department sought to guarantee the election of a non-white so that the composition of the state legislature would be more racially balanced. The implicit demand was that non-whites be given a minimum 65% majority--nearly two-to-one--so that, presumably, a white candidate would have virtually no chance of election. The legislature felt it had no choice but to comply.

We most strongly object to this form of racially-motivated reapportionment. A

redistricting plan which draws lines that, on the one hand, circumscribe an overwhelming non-white majority and, on the other hand, recklessly cut in two a cohesive white Hasidic community, is an odius form of gerrymandering, thoroughly repugnant to the principles of free elections. In essence, it transmogrifies the concept of free elections into the proposition that elections are to be free so long as the "right" candidate wins. And its clear message is that white Americans can have their most fundamental rights wrested from them so that minority candidates, in the name of compensatory treatment, can be pushed into elected office. Condonation of such a contrivance would compel us to nod our heads grudgingly in affirmative response to one writer's reductio ad absurdum query:

> What would then be wrong with a state's giving Negroes preferential treatment at the ballot box--say, one man, two votes? If the neutral principle that the Constitution is color-blind is unduly simplistic and inappropriate for the complexities of today's world, why is the equally simple principle of one man, one vote entitled to gentler treatment? Kaplan, Equal Justice in an Unequal World: Equality for the Negro--The Problem of Special Treatment, 61 Nw. U.L. Rev. 363, 382 (1966) (hereinafter "Kaplan").

Attempts to find precedent for racial gerrymandering in earlier decisions of this and other courts fall far wide of the mark. The courts have approved various forms of remedial programs--under such rubrics as "quotas," "compensatory treatment," and "affirmative action"--where the victims of racially discriminatory practices have been powerless to help themselves. Where the doors to the superior schoolhouse, the housing project, the factory loft or the union hall are tightly locked to the black person, a strong

judicial arm must break down those doors. See, e.g., Swann v. Charlotte-Mecklenburgh Board of Education, 402 U.S. 1 (1971) (school busing); Contractors Ass'n v. Secretary of Labor, 442 F. 2d 159 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971) ("Philadelphia Plan"); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920 (2d Cir. 1968) (public housing project).2/

2/ We nevertheless note that the concepts of affirmative action and compensatory racial quotas have been subject to much misunderstanding and misapplication. For example, President Johnson's Executive Order 11246 of 1965, as amended, §202(1), required federal contractors, including institutions of higher education, to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." This was followed by a spate of policy decisions by universities to limit certain open teaching positions to black and women applicants exclusively, regardless of demonstrably superior qualifications of white male candidates. The butterness and re-

(continued)

The issue of racial equality within the electoral process differs fundamentally from the above matters. Poll taxes and literacy tests have long since disappeared. The voting booths are open to all. The Constitution proscribes any device or procedure which makes it impossible or difficult for minorities to attain equal representation. But it does not require, nor does it permit, that any given minority group be

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sentment thereby created is well known. Ultimately, the federal government had to backtrack by making it clear that "affirmative action" referred to a broadening of the applicant pool through the recruitment of minorities and women, but did not mean racially or sexually exclusive hiring practices. See Department of Health, Education and Welfare, Memorandum to College and University Presidents (Dec. 1974).

It is no wonder that one court insisted that it would approve remedial racial relief "somewhat gingerly." Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 482 F. 2d 1333, 1340 (2d Cir. 1973).

assured, through gerrymandering or like schemes, of the electoral victory of "their" candidate. The Constitution demands only that minorities be afforded a meaningful opportunity to vote under circumstances which provide them an equal chance to attain proportional representation. Where, as under the 1972 New York State apportionment, non-whites have a fair and realistic opportunity to elect their preferred candidate, the onus falls squarely on the shoulders of the minority community. Unlike schools and jobs, the polls are accessible to every man and woman. Tampering by the legislature or the Justice Department in this instance is not "corrective action," but rather a corruption of constitutional principles.

In Whitcomb v. Chavis, 403 U.S. 124 1971, this Court reserved a district court decision which declared that provi-

sions in an Indiana apportionment plan creating a multimember district for Marion County were unconstitutional because they minimized the voting strength of blacks living in the Center Township ghetto. Mr. Justice White, speaking for the majority, stated (emphasis added):

> We have discovered nothing in the record or in the Court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen.... The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system. Id. at 149-50, 155.

"Awareness of racial composition" may be permissible "to correct past constitutional

violations," Swann, supra, 402 U.S. at 25, where the aggrieved racial group cannot itself readily take remedial action; but racial quotas certainly cannot be justified where those seeking redress need only pull a lever.

The reapportionment plan in question is marred by a further fundamental flaw. The racially-motivated districting constitutes, in a word, segregation. The identity of the legislative creature can no more be transmuted through such characterizations as "compensatory racial reapportionment" than could that of the proverbial cow about whose neck hung a sign reading "horse". The creation of preponderantly non-white districts is an act of unmitigated segregation, benign intentions notwithstanding. Remedial use of race in school assignments or employment is justifiable or even desirable because it promotes

the social and constitutional goal of integration. Racially inspired redistricting only frustrates this goal.

There is scant need for us to chronicle this Court's unremitting efforts to eradicate the scourge of racial segregation from our society. See, e.g., Schuro v. Bynum, 375 U.S. 395 (1964) (municipal auditorium); Turner v. City of Memphis, 369 U.S. 350 (1962) (restaurant); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf course); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (public schools). Specifically, an issue parallel to the one at bar was raised in Wright v. Rockefeller, 376 U.S. 52 (1964). The appellants there challenged the constitutionality of the

part of New York's 1961 congressional apportionment statute which defined districts along racial lines and thereby diluted the voting strength of non-whites. The Court held that racial intent had not been proven and it therefore did not reach the segregation issue. Justice Douglas, however, stated unequivocally in his dissenting opinion that districting which results in segregation is unconstitutional. "We should uproot all vestiges of Plessy v. Ferguson...." Id. at 62. The argument by minority group intervenors that the concentration of non-white voters in a single district was advantageous in that it facilitated the election of minority group candidates was soundly rejected by Justice Douglas:

> Their theory might be called the theory of 'separate but better off' - a theory that has been used before... in support of municipal segregation in residential areas... of segregation in restaurants...[and] of delayed integration of municipal parks.... The fact that Negro political leaders find advantage in this nearly solid Negro and Puerto Rican district is irrelevant to our problem. Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards. Id.

Racial segregation is a horror which has plagued this nation too long and has been too long in dying. Can there be any justification for breathing new life into this evil? Any plan which partitions, which draws lines, which builds walls on the basis of race is segregative and therefore wrongful. The Constitution does not brook violations of its cherished rights merely because such violations are labeled "benign." Racial segregation is as unacceptable for "compensatory" purposes as it was for the odious purposes that prompted its insti-

tution.3/

II

THE APPELLEES' PLAN TO COMPENSATE NON-WHITES IS SIMPLISTIC AND IS DOOMED TO FAILURE.

We urge that a redistricting plan

3/ One cannot argue that the segregative redistricting plan is valid because it is acceptable to the non-whites who are its "victims." Leaving aside the fact that there has been no showing that the non-whites of Williamsburgh approve of the plan, the argument of itself has no merit. Segregation is on its face unconstitutional. Brown and its progeny have once and for all put to an end State discrimination and segregation. The fact that a racial community may under a particular circumstance not be averse to being segregated does not make such segregation constitutionally permissible.

Indeed, the above argument calls to mind incidents of the late 1960's in which numerous universities witnessed demands by Negro students for exclusively black dormitories and courses. Despite the fact that these students believed that this form of segregation would be beneficial to them, no one would suggest for a moment that such an arrangement could pass the test of constitutionality.

which utilizes nice mathematical formulas to insure the maximization of non-white voting power and at the same time to guard against the "wasting" of minority votes is patently offensive to minority citizens and is ultimately self-defeating. Mr. Justice Douglas broached this subject in his dissenting opinion in DeFunis v. Odegaard, 416 U.S. 312, 343: "One... assumption must be clearly disproved, that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a state is not permitted to place on any[one]."

The drawing of district lines in a manner designed to grant a virtually automatic victory to a minority group candidate is paternalistic and demeaning. "The psychological truth... has only lately begun to be realized, that for the dispossessed benefits granted are not

nearly so sweet as benefits won, and that help, even from a benign overlord, is often seen as humiliating and patronizing." Kaplan, supra, at 382. The implicit assumption is that non-whites cannot be trusted to handle their own affairs; that minorities are somehow incapable of competing with whites for political representation and therefore require electoral handouts. Such thinking is both factually untenable and socially scurrilous. Nor does well-meaning discriminatory social planning pass constitutional muster. "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." DeFunis, supra, 416 U.S. at 342 (Douglas, J., dissenting) (emphasis added).

As Justice Douglas sharply notes in

DeFunis, id. at 343:

> If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordionlike quality.

The enticing tune of today's accordianist can readily become tomorrow's harsh cacophony. Discrimination and racial favoritism, albeit benign, bear dangerously atavistic seeds: "separate but better off" is too close a kin to its notorious ancestor "separate but equal" and all its attendant inequities. The special treatment accorded blacks--especially when at the expense of other minorities--could well return in the future to haunt all minorities. Kaplan, supra, at 382, has well summed up the problem:

> [I]t may be difficult in many practical situations to distinguish between preferential and hostile treatment. As a result, in deciding whether to depart

> from the easily applied principle of color-blindness, a court may be influenced by the fact that the upholding of a well-intentioned preference today may serve as a precedent for the allowance of most unpleasant treatment of minorities in the future.

The problems inherent in racial reapportionment make of it a socio-political Gordian knot. One court correctly pointed out in Vulcan Society of New York City Fire Department v. Civil Service Commission of New York, 360 F. Supp. 1265, 1278 (S.D.N.Y. 1973), aff'd, 490 F. 2d 387 (2d Cir. 1974):

> Adjustments based upon racial classification, however well-intentioned, contain within themselves the seed of further divisiveness regardless of their benevolent purpose. Attempts to make fair adjustments may be counterproductive and tend to generate resentments which serve to exacerbate rather than to diminish racial attitudes.

Furthermore, the injection of a potent racial ingredient into the electoral

process diverts attention away from genuine political issues and makes race the focal point of elections. In fact, the highlighting of race as a real and relevant factor in elections undercuts a basic principle that has slowly been ingrained in the hearts and minds of America; that skin pigment is not the standard by which to measure a person, that it is not a germane element in a political or any other contest.

> [T]he government's intentional and explicit use of race as a criterion of choice is bound--no matter how careful the explanation that this is a "good" use of race--to weaken the educative force of its concurrent instruction that a man is to be judged as a man, that his race has nothing to do with his merit. Citizens, thus beseiged by what will understandably be taken to represent two conflicting government-endorsed principles, are likely to listen to the voice they wish to hear. Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1259 (1970).

See generally Wright v. Rockefeller, supra, 376 U.S. at 59-62 (Douglas, J., dissenting); Kaplan, supra, at 375-80; O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, 80 Yale L.J. 699, 709-11 (1971).

The shapers of the 1974 reapportionment plan apparently seek to justify the paramount importance they attach to the racial factor with the theory that only a non-white can adequately represent non-whites and that, furthermore, minorities naturally prefer and close ranks behind minority group candidates. This proposition is factually baseless; it succeeds only in propogating the myth that skin color predetermines a person's needs and attitudes. There are numerous factors other than race--not the least of which is financial status--which are of equal or greater weight in molding one's socio-

political perspectives. A middle class black will likely have more in common with a middle class white than with a black living at the poverty level.4/

4/ We cite an illustrative example:

In the mid-1960's New York City's Council Against Poverty designated the predominantly black Crown Heights section of Brooklyn as one of the official "poverty areas" of the City, thereby making area residents eligible for federal and local anti-poverty funds and services pursuant to Title II of the Economic Opportunity Act of 1964, as amended, 42 U.S.C. §§2781-97. The Council's decision was welcomed by poor blacks and whites of the community, but was bitterly fought by middle-income blacks who resided or owned property in Crown Heights who feared that the stigma of the poverty designation would cause a drop in the value of their real estate holdings and a rise in insurance rates. See T. Calabia, Ethnicity and Poverty in New York City in the 'Seventies' 3 (1974) (hereinafter "Calabia Report").

Surely these middle-income blacks are more interested in legislative representation by solons--black or white--who lend a sympathetic ear to their plaints than in a slate of candidates whose major qualification is their "blackness."

The dynamics of demography further belie the claimed validity of the plan. The framers of the legislation sought to create a district in which non-whites were neither too "concentrated" nor too "diffused." A range of 65-70 percent was viewed as acceptable, any upward or downward variation as objectionable. Consequently the present plan for a minimum 65% non-white majority was adopted. But what will the actual racial percentages be two or four years from now? If New York's population shifts and "white flight" continue apace, is it not probable that the non-white population of the Williamsburgh districts will pass the 70% mark?5/ Will a new reapportionment then

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5/ The ethnic distribution of New York City's population has shown marked changes during the intercensal period of 1960-1970.

(continued)

City-wide, the white majority dropped from 77.78% to 67.21%. The white population declined by about three-quarters of a million, while non-whites (for purposes of this footnote, this category includes blacks, Puerto Ricans, and other non-whites) increased by about 860,000.

The vast bulk of white out-migration was from the City's twenty-six designated "poverty areas." All but six of these areas had by 1970 become exclusively or predominantly non-white.

In Williamsburgh, one of the "poverty areas," non-whites were a 60% majority in 1970; in 1960 they numbered 40%.

See generally A. Burstein, A Demographic Profile of New York City, x and 74-91 (1973); Calabia Report, supra, at 12.

There seems to be no let-up in sight to the City's continued white out-migration, nor to the increment of non-white population and the increasingly segregated residential patterns. It is estimated that if present trends continue, blacks and Puerto Ricans will constitute a majority by the early or mid-1980's. See Calabia Report, supra, at 7.

It should be evident that the assumption that the non-white population of the Williamsburgh districts will for any length of time remain within the narrow range suggested by the appellees is somewhat fanciful.

become necessary? So long as precise racial formulae serve as the sole basis for apportionment, can stability and continuity ever be hoped for? The Court in Ferrell v. Oklahoma, 339 F. Supp. 73,83 (W.D. Okla. 1972), aff'd, 409 U.S. 939 (1972), said:

> [I]f a district be carved especially for the blacks (permissible but not required) who can say that it will long remain thus? We judicially notice that through changes in housing patterns, urban renewal, slum clearance, public housing and other factors the minority races are on the move in more ways than one.

Ironically, the very design by which the appellees seek to strip electoral power from Williamsburgh's white citizens and vest it in the non-whites may very well be the latter's political undoing. When laws are enacted which unduly favor minorities in racially mixed areas, racial divisiveness and white frustration are

inevitable. When such laws go so far as to negate the hard-won socio-political attainments of a beleaguered white community whose viability is thereby threatened, it is a virtual certainty that the whites will embark on a search for more hospitable environs. If, instead of inducing whites to remain put with the promise of racial equality and harmony, misguided social engineers antagonize and "punish" them with grand racially-"compensatory" schemes which harshly undercut their political and economic power, the whites will predictably opt for the path of least resistance: flight.

While the white exodus from the nation's urban centers continues unabated, the Hasidim of Williamsburgh are reckoned among the few hardy and high-principled white communities who have rejected the blandishments of the suburban refuge.

Although now living side by side with solidly non-white neighbors, not always friendly, the Hasidim stand fast. They struggle hard to maintain a vibrant community, but feel that they can endure in the effort to surmount the difficulties and hostility only if they have the continued understanding and receptiveness of elected officials. The Hasidim rightly fear that new politicians, catapulted into office as a result of the 1974 reapportionment plan, will--as the appellees themselves expect--have special loyalties to the non-whites, and will not be apprehensive of repercussions at the ballot box. With the Hasidic community being thus left exposed and vulnerable, the Hasidim may have little choice but to pack their bags and seek shelter elsewhere.

The consequence of the appellees'

myopic policy will undoubtedly be quite the opposite of the intended effect. As the Hasidim and other remaining whites feel compelled to leave, Williamsburgh will become ever more "concentrated" with non-whites. The result will be increased ghettoization, dilution of voting power, and a recurrence of the circumstances that roused the blacks of Harlem into litigation in Wright v. Rockefeller, supra.

Indeed, it is no accident that Adam Clayton Powell who, at the time of the Wright decision, had been in office for about twenty years, was an intervenor on the side of the respondents. As noted by Justice Douglas, Powell, together with other political intervenors, had "a vested interest in control of the segregated Eighteenth District." 376 U.S. at 62. Politicians who have been voted into

office by ghetto constituencies on the basis of race can afford to feel safely ensconced in their seats of power. Judicious use of minority catchwords and appeals to racial unity are often sufficient to insure that political factionalism will not be a factor at the poll. If there is a lesson to be learned from the experience of Harlem and numerous other minority communities, it is that the compacting of non-whites into racially and politically monolithic districts increases the likelihood of political neglect and manipulation.

Finally, we cannot allow the appellees' concept of "non-white" to go unnoticed. The requirement of 65% non-whites includes blacks and Puerto Ricans. The artificiality of this formula was recognized by the Justice Department which, in its memorandum of July 1, 1974, sought to bolster the contrived racial combination by stating

that "where black or Puerto Rican candidates have 'white' opposition, the two groups tend to unite behind the 'minority' candidate." This argument is sheer makeweight. If Puerto Ricans have suffered discrimination at the hands of whites, they have fared little better in their relationship with blacks. To cite one example, we turn again to New York City's "community action" (anti-poverty) program. Almost from the program's inception in the mid-1960's, Puerto Rican groups have been fighting fiercely to wrench control of anti-poverty agencies and funds from blacks who had gained early domination. The struggle has been marked by vilification and accusation, venomous political contests, and pitched street battles. See State Charter Revision Commission for New York City, The Community Action Experience, 32, 66, 70, and 73-4 (1973). See

also United Jewish Organizations of Williamsburgh v. Wilson, 510 F. 2d 512, 529 n.4 (2d Cir. 1974) (Frankel, J., dissenting). The fact is that in the very case at bar Puerto Rican groups expressed dissatisfaction with the 1974 reapportionment plan because it weakened their relative voting strength while augmenting that of the blacks. The Justice Department's memorandum blithely dismissed the Puerto Ricans' remonstrances. The conclusion that all non-white groups will march forth in blissful political unity is simplistic and takes no account of the sometimes unpleasant ethnic realities of New York.6/

6/ The intensification of racial and ethnic consciousness in the past fifteen years, and the widespread acceptance of a "black-white" dichotomy, have placed Hispanics in something of a demographic limbo. In dealing with Puerto Ricans in particular, demographers and census takers have (continued)

not been at all certain which label to attach. Although in many census charts Puerto Ricans appear as a separate and distinct group, there seems to be a compelling desire on the part of statisticians to tag them as either black or white. Generally, individual Puerto Ricans themselves seem to have been given the option of deciding their color.

For purposes of social welfare programs, government officialdom has for the most part been grouping Puerto Ricans together with blacks. Apropos of this official policy we call attention to the caveat proffered in Kaplan, supra, at 381:

> "[W]here race is used as a criterion of governmental action impinging on the lives of individuals, and most important, where the government accords differential treatment to individuals solely because of their race, the erosion of the color blindness principle by the government may become...serious.
>
> "The damage that such governmental action can do is sometimes quite difficult to predict in advance. An argument can be made that the assimilation of the Puerto Ricans in New York was proceeding better before they were officially classified as Negroes for the purpose of perfectly well-intentioned programs. The effect (continued)

After the platitudinous veneer is peeled from the 1974 reapportionment law, a careful scrutiny reveals it for what it is: a plan bereft of constitutional or social validity. A blatant racial quota system is utilized which bodes ill for both the white and non-white community. Constitutional principles of equality and integration are thrown to the wind, to be replaced by groundless assumptions, baseless theories, and wishful thinking. This Court cannot allow the ideal of racial equality to be sacrificed on the alter of good intentions.

> of the law has been to stamp them more clearly as a group apart, a designation to which both they and the rest of society could not help but react."

It is no wonder, then, that of the 811,843 Puerto Ricans in the City in 1970, 741,218 (91.3%) were listed as white, while only 70,625 were listed as black. Burstein, supra, at 76n.; see also Calabia Report, supra, at 9.

III

A REAPPORTIONMENT PLAN WHICH DIVIDES A UNIQUE, COHESIVE HASIDIC COMMUNITY AND THEREBY SUBSTANTIALLY ATTENUATES ITS VOTING POWER IS INVALID.

In our arguments above, we challenged the validity of compensatory racial reapportionment, as applied by the appellees, on constitutional and other grounds. We now further contend that, even if under pristine circumstances such reapportionment may have merit, it is nevertheless indefensible here because of its politically crippling impact on the appellants.

This Court has expressed its views on the franchise in no uncertain terms in Reynolds v. Sims, 377 U.S. 533 (1964):

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative gov-

> ernment. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

The Court called for an "aware[ness] that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination' Lane v. Wilson, 307 U.S. 268...," id., at 563, and further approvingly quoted the words of Mr. Justice Black in Colegrove v. Green, 328 U.S. 549, 571 (1946) (Black, J., dissenting):

> [A] state legislature cannot deny eligible voters the right to vote for Congressmen and the right to have their vote counted. It can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of 'apportionment' than under any other name. 377 U.S. at 563 n.40.

The Court, id. at 555n. 29, also cited Mr. Justice Douglas's admonition that "the federally protected right [to vote] suffers

substantial dilution... [where a] favored group has full voting strength ... [and] [t]he groups not in favor have their votes discounted." South v. Peters, 339 U.S. 276,279 (1950).

The Court below has already determined that the appellant's have standing in this constitutional controversy as white voters, United Jewish Organizations of Williamsburgh v. Wilson, supra, 510 F. 2d at 521-2. Although appellants have standing as whites, their "measure of damages," to borrow a phrase, must be assessed in the light of the particular condition of the Hasidic community.

The more than thirty thousand Hasidim residing in Williamsburgh are jammed into a small, drab inner city area where tenement houses and storefronts predominate--a neighborhood which would otherwise be described as a ghetto. Indeed, the seminal

factors that normally breed ghettos are abundantly present. The Hasidic community is in many ways isolated--partly of its own doing and partly because of the antagonism and derision the Hasidim face from other ethnic groups residing about them. A large portion of the Hasidim, including the young, have little or no working knowledge of English. Unemployment among the men (the women rarely work) stands at about 25% and is increasing, N.Y. Times, Nov. 23, 1975, §B, at 5, col. 1. Their refusal to pursue secular education beyond the high school level effectively excludes the Hasidim from white collar jobs. Most of those who are employed work at blue collar, semi-skilled and unskilled jobs. Their singular religious practices (e.g. strict observance of the Sabbath from sundown on Friday to sundown on Saturday and of dietary laws) and

appearance (close-cropped hair, beards, and black suits, hats, and caftans) make it difficult for the Hasidim to obtain and retain employment. Despite the laws enacted in the past decade which forbid religious discrimination in employment, Hasidim continue to face obstacles and harrassment by employers and unions.

Poverty abounds in the community. Families are large: the median number of children is 6.3. Wolfe, The Invisible Jewish Poor, 48 Journal of Jewish Communal Service 6-7 (1972). Even middle-income families are often reduced to near poverty because of such major expenses as yeshiva education for the children, expensive kosher food, and charitable contributions. Welfare is almost never resorted to.

Yet those multitudinous evils which we have come to routinely expect in impov-

erished ghetto areas are virtually non-existent in Hasidic Williamsburgh. Crime and violence, juvenile delinquency, drug addiction and alcoholism, prostitution and venereal disease, filth and decay--all are conspicuously absent.

In addition to a network of religious schools and institutions, the community has programs to provide housing, emergency medical assistance, food and other necessities for the indigent, scholarship funds, vocational training, free loans for the needy, assistance to small businessmen and a host of other services. Indeed, Hasidic Williamsburgh represents what is perhaps a unique phenomenon in this nation. While there have been other such self-reliant religiously-motivated communities in the more idyllic sections of the country, few if any have remained viable and vibrant in

the heart of the urban maelstrom. It is further noteworthy that since the federal government does not recognize Jews as a minority group, the Hasidim have never been eligible for the special considerations given other minorities.

The homogeneity of the Hasidic group is of course apparent in the uniformity of language, dress, and religious devotion. Serving as a further binding factor are the searing memories of the Holocaust and of Stalinism. Few of the Hasidim are more than one generation removed from these horrors. But the Hasidim have never sought pity or favoritism. They sought, and believed that they had found in this country, an environment of freedom in which their inner resources and perseverance could achieve for them the stability and self-determination they

longed for.[8]

Certainly the accomplishments of the Hasidim bear witness to their cohesiveness and determination. But community development cannot continue on a frail economic base. Within the past decade community leaders have come to recognize that future survival depends on some measure of political activity. The Hasidim have never sought headlines nor have they engaged in the politics of confrontation. But, under the prodding of their leadership, they have been awakened to the fact that the strength they exhibit at the polls will insure that there will be some

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[8] Interestingly, and not without irony, is the fact that a small but growing number of the Hasidim are recent emigres from the Soviet Union. Religious discrimination, "central planning," and policies of pitting ethnic groups against each other, are among the harsh realities of Soviet life that these Hasidim sought to escape.

legislative voices raised in their defense. At this juncture, the Hasidim are all well aware that the underpinnings of their past and present growth lie in the institutions of representative government.

The concept of participating in governmental processes was slow to gain a foothold among the Hasidim. The older generation had been raised in an Eastern European milieu in which the government was hated and feared. After their arrival on these shores, their suspicions of all political entities remained and were often adopted by their children. Despite initial skepticism, however, a political consciousness began to grow among the Hasidim as they painstakingly developed an understanding of the workings of democracy. Eventually the Hasidim came to rely heavily on their political representatives in their struggle against poverty, dis-

crimination, abuse and neglect. The voice of a united Hasidic Williamsburgh which called attention to such needs as housing and education was clearly heard in political chambers. The community lived with hope. Now that hope has been dashed. An act of legislative legerdemain--one line rudely drawn through Hasidic Williamsburgh --has politically silenced the Hasidim.

The Hasidim are the apotheosis of the "discrete and insular minorities" to whom Justice Stone gave special recognition, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). "[P]rejudice against [them] ... may be a special condition... which may call for a correspondingly more searching judicial inquiry." Id. For such minorities, "heightened judicial solicitude is appropriate," Graham v. Richardson, 403 U.S. 365,372 (1971). In fact, this Court has

been zealous to acknowledge the unique needs and conditions of "discrete minorities" and to protect these groups from wrongful legislative pressures. A case in point is Wisconsin v. Yoder, 406 U.S. 205 (1972), in which this Court held that a state could not constitutionally compel Amish parents to send their children to high school. The Court reasoned that since the Amish people are law-abiding and fully productive, there can be no justification for forcing them to violate religious prohibitions against secular education.

The present plight of the Hasidim begs for judicial inquiry and solicitude. An isolated and hitherto silent minority with a history of persecution matching that of the most oppressed of groups--and with aspirations realizable only through elective representation--is now effectively

disenfranchised. We reject any argument that here, as in certain cases of "affirmative action" in employment, whites must suffer reverse discrimination in order to compensate previously underprivileded non-whites. This contention may have some merit when the whites in question are those who comprise mainstream America, but it is clearly not valid when the whites themselves are a distinct minority who have also been the victims of privation and discrimination. Furthermore, the nature and impact of limited discriminatory hiring practices are not nearly as severe as those of disenfranchisement. "[T]he right of suffrage is a fundamental matter in a free and democratic society.... [It] is preservative of other basic civil and political rights." Reynolds v. Sims, supra, 377 U.S. at 561-2. The reapportionment plan which dilutes the vote of

the Hasidim and mutes their political voice should not be graced with this Court's imprimatur.

CONCLUSION

The struggle for racial and ethnic equality has troubled and convulsed our society virtually from this nation's birth. The cost of victory, or near-victory, has been too high: too many lives, too many tears, too many battles. If there is to be an ultimate purpose and meaning to the sacrifices that we as a people have made, we must be ever vigilant that the purity of our principles never be compromised. It would be tragically ironic if the long struggle for racial equality and harmony were to climax in legislatively-sanctioned inequality.

It is a truism that racial favoritism is the flip side of racial discrimination. In providing supposed political compensation to certain minorities, the appellees have, with the same stroke, taken from another minority one of "our most precious freedoms" -- "the right... to cast votes effectively." Williams v. Rhodes, 393 U.S. 23,30 (1968). In the process they have inflicted racial wounds on both white and non-white Williamsburgh from which the community may never recover. And perhaps most unfortunate, the appellees have, albeit unwittingly, set in motion forces whose vile tentacles reach far beyond the borders of Williamsburgh. We urge this Court to stay the hand of those who seek to "sow the wind" but fail to see that "they shall reap the whirlwind." Hosea 8:7. The judgment of the Court of

Appeals should be reversed.

Respectfully submitted,

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